No. 87-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER COMPANY, *et. al.*,
Petitioners,

v.

RICHARD BRUCH, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE TRAVELERS INSURANCE COMPANY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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I.

QUESTION PRESENTED

Should a benefits claim decision made by a fiduciary of an employee benefit plan which is regulated by the Employee Retirement Income Security Act of 1974, as amended, be afforded a high degree of judicial deference in accordance with principles of the common law of trusts?

II.

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DESCRIPTION AND INTEREST OF *AMICUS CURIAE*[1]

The Travelers Insurance Company ("Travelers") markets insurance policies and insurance-related services and activities throughout the United States. A significant portion of Travelers' insurance business involves the sale of policies which fund benefits provided under employee benefit plans which are regulated by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 *et seq.* ("ERISA").[2] A similarly

[1] This brief was filed with the consent of the parties involved; evidence of such consent is on file with the Clerk of the Court pursuant to Rule 36 of this Court. This brief addresses only the issue regarding the standard of review to be applied by the judiciary in reviewing benefit claims decisions of employee benefit plan fiduciaries.

[2] As used throughout this brief, the terms "plan" or "plans" are intended to reference only those arrangements which are regulated by ERISA. Citations throughout this brief are to ERISA; see the Table of Authorities for parallel U.S.C. citations.

significant portion of Travelers' business throughout the United States consists of providing services necessary for the maintenance and administration of plans. Such services, which may be provided in conjunction with a policy funding such a plan or which may be provided pursuant to an administrative-services-only contract, include: claims processing, preparation of administrative forms, preparation and distribution of disclosures required by ERISA, calculation of funding requirements and projected cost estimates, assistance in plan design and preparation of materials which are required to be filed with governmental agencies.

In this case, the Third Circuit Court of Appeals has made a significant departure from the deferential standard of judicial review historically applied to plan fiduciaries' benefit claims decisions. Such decision purports to eliminate any judicial deference to such fiduciary decisions under certain circumstances. If upheld, the Third Circuit's decision will inevitably result in the following: (i) inconsistent application of plans in fact situations which are similar in all respects except the jurisdiction of the reviewing court; (ii) additional costs (e.g., the difference between defending a trial *de novo* as opposed to the more limited review of judicial deference and the cost of providing unintended benefits) creating a disincentive to establish or continue such plans; and (iii) unlimited and unwarranted judicial interference in plans' operation and administration.

For the reasons described above, the Third Circuit's decision below directly affects the plans of Travelers' customers and, thus, the business of Travelers. For the same reasons and to the extent that Travelers acts as administrative fiduciary, claims processor or service provider of such plans, the Third Circuit's decision below directly affects Travelers' conduct of such activities.

SUMMARY OF ARGUMENT

Since ERISA's enactment, the federal courts have developed a body of federal common law under ERISA which, when added to ERISA's statutory provisions, constitutes the uniform and

comprehensive body of law governing plans as intended by Congress. As a part of this body of law, the federal courts have adopted a highly deferential standard of judicial review of fiduciaries' claims decisions. Such standard, which has been given the somewhat unfortunate name of the "arbitrary and capricious standard of review", was developed almost exclusively by reference (either directly or indirectly) to common law trust principles. Support for reference to such law was derived from manifestations of Congressional intent in enactment of ERISA as evidenced by the content and structure of the law itself, its legislative history, and its striking similarity to parallel provisions of the Labor Management Relations Act (which has itself been fleshed out by federal common law which referenced the common law of trusts).

Because the Third Circuit's decision below frustrates Congressional intent as to the applicable law to be applied to the operation and administration of plans and because it is at odds with the overall structure of ERISA, it should be reversed. Such reversal should take the form of an opinion of this Court which provides clear and effective guidance regarding the proper standard of judicial review of benefit claims decisions of plan fiduciaries.

ARGUMENT

I.

ERISA IS A CAREFULLY ORCHESTRATED WHOLE AND SHOULD BE CONSTRUED ACCORDINGLY

ERISA itself does not directly address the question of the standard of review that courts are to apply when reviewing the conduct of plan fiduciaries. This is surprising given the degree of care with which ERISA was crafted in terms of imposing requirements and standards with respect to plan fiduciaries and plan operation and administration:

> 1. "Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries

who jointly or severally shall have authority to control and manage operation and administration of the plan." ERISA § 402(a)(1).

2. "Every employee benefit plan shall . . . describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan . . .." ERISA § 402(b).

3. ". . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) deferring reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to so do; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this Title or Title IV." ERISA § 404(a)(1).

4. "The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than the named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan." ERISA § 405(c)(1).

5. "A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice

which violates any provision of this Title or the terms of the plan . . . or to enforce any provision of this Title or the terms of the plan . . .." ERISA § 502(a).

6. "In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participants, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." ERISA § 503.

Some fundamental concepts regarding Congressional intent as to the scope and nature of ERISA's regulation of the operation and administration of plans can be extrapolated from the foregoing statutes without resort to examination of the legislative history of ERISA. First, Congress intended that both the ongoing operation and administration of plans as well as the investment of plan assets would be the responsibility of the individuals or entities appointed by the plan sponsor in the document establishing the plan. Second, Congress intended that those individuals and entities charged with the responsibility of administration and operation of a plan would occupy the same fiduciary status and would be subject to the same statutory standard of conduct as those individuals and entities who were fiduciaries responsible for the investment of the plan's assets. Third, Congress intended and, in fact, mandated by statute that administrative fiduciaries of plans themselves give the highest degree of deference to the terms and provisions of plan documents and that they deny or modify a benefit claim pursuant to very formal procedures and, in the case of a participant's appeal, only after the most careful and considered review. Fourth, since there are no proscriptions against the sponsor of the plan or an officer of such sponsor serving as either an administrative or an investment fiduciary with respect to such plan, Congress intended to permit them to do so (providing, however, special protection for plans

having such fiduciaries via the prohibited transaction sanctions of section 406 of ERISA, with a concomitant statutory rule under section 408(c)(3) of ERISA pursuant to which such sanctions were not to be construed to prevent service as a fiduciary by an officer, employee or agent of the plan sponsor). Fifth, since Congress did not provide different standards governing the conduct of plan sponsors or their officers who serve as plan fiduciaries and did not by statute charge them with more onerous requirements to follow in terms of plan operation and administration or the investment of plan assets, Congress felt that such differentiation would be inappropriate and unnecessary. Finally and most importantly, having addressed fully in the statute allocation of fiduciary responsibilities, a very high mandated standard of fiduciary conduct and imposition of the requirement that fiduciaries police each other under section 405 of ERISA, Congress intended that the decisions and determinations of a plan fiduciary, be it administrative or investment fiduciary, be given great weight.

In sum, ERISA may be silent on the standard of judicial review to be accorded the decisions of plan fiduciaries but the "mood" of the statute would seem to compel a determination that courts exercise a high degree of judicial deference in reviewing their decisions and determinations. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 470, 487 (1951).

II.

THE MULTIPLE TRUST LAW PROVISIONS SPECIFICIALLY INCORPORATED IN THE TEXT OF ERISA EVIDENCE CONGRESSIONAL INTENT THAT TRUST LAW SHOULD BE THE BASIC BODY OF LAW GOVERNING ERISA

In drafting ERISA, Congress was not operating in a total void. Either of two well-developed bodies of law— contract or trust law—could have been used as a model to frame the structure of ERISA. The conclusion is inescapable that Congress chose trust law as a basis for framing ERISA. As the following comparison demonstrates, the duties and standard of conduct

for plan fiduciaries as set forth in ERISA are clearly derived from trust law principles:

Law of Trusts	ERISA
The trustee is under a duty ... to administer the trust solely in the interest of the beneficiary. Restatement (Second) of Trusts § 170(1) (1959).	... a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants ... ERISA § 404(a)(1).
The trustee ... is under a duty ... to communicate all material facts [to the beneficiary] ... Restatement (Second) of Trusts § 170(2) (1959).	The administrator of each employee benefit plan shall cause to be distributed ... a summary plan description and the information described in sections 104(b)(3) and 105(a) and (c) [of ERISA]. ERISA § 101(a).
The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts ... Restatement (Second) of Trusts § 172 (1959).	An annual report shall be published with respect to every employee benefit plan ... ERISA § 103.
The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information ... Restatement (Second) of Trusts § 173 (1959).	*See* Reporting of Participants Benefit Rights, Retention of Records, and Record-keeping and Reporting Requirements. ERISA §§ 105, 107 and 209.
The trustee is under a duty to the beneficiary ... to exercise such care and skill as a man of ordinary prudence would exercise ... Restatement (Second) of Trusts § 174 (1959).	A fiduciary shall discharge his duties ... with the care, skill, prudence and diligence ... that a prudent man ... would use ... ERISA § 404(a)(1)(B).
If there are several trustees, then each ... is to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust ... Restatement (Second) of Trusts § 184 (1959).	... a fiduciary shall be liable for a breach of the fiduciary responsibility of another fiduciary ... if ... he has enabled such other fiduciary to commit such breach ... or he has knowledge of [such] breach ... unless he makes reasonable efforts to remedy the breach. ERISA § 405(a).
The trustee can properly incur expenses which are necessary or appropriate to carry out the purposes of the trust ... Restatement (Second) of Trusts § 188 (1959).	A fiduciary ... shall discharge his duties ... for the exclusive purpose of providing benefits to participants ... and defraying reasonable expenses of administering the plan ... ERISA § 404(a)(1)(A).
The beneficiary of a trust can maintain a suit to compel the trustee to perform his duties as a trustee, to enjoin the trustee from committing a breach of trust, ... to appoint a receiver ... [or] to remove the trustee. Restatement (Second) of Trusts § 199 (1959).	A civil action may be brought by a participant ... to enjoin any act or practice which violates any provision of this Title or the terms of a plan, to obtain other appropriate equitable relief, to redress such violations or to enforce any provisions of this Title or the terms of the plan. ERISA § 502.

Law of Trusts	ERISA
If the trustee commits a breach of trust, he is chargeable with (a) any loss... resulting from the breach of trust, or any profit made by him through the breach of trust ... Restatement (Second) of Trusts § 205 (1959).	Any person who is a fiduciary ... who breaches his ... duties ... shall be personally liable to make good any losses to the plan resulting from each such breach and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan ... ERISA § 409.
... The trustee is under a duty to the beneficiary to distribute the risk of loss by a reasonable diversification of investments, unless under the circumstances it is prudent not to do so. Restatement (Second) of Trusts § 228 (1959).	A fiduciary shall discharge his duties ... by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so ... ERISA § 404(a)(1)(C).

There are other similarities between the common law of trusts and ERISA; the foregoing are merely some of the more striking similarities.

Congress itself declared its reliance upon trust law in crafting ERISA: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 533, 93d Cong., 2d Sess. 11, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4649. Obviously, ERISA differs from trust law principles in some respects and, where the statute expressly does so, it prevails. Where the statute is silent, however, the courts should reference trust law to carry out Congressional intent. Moreover, the silence of ERISA as to the issue of judicial review of fiduciary decisions was not a Congressional oversight. Early versions of ERISA incorporated proposed alternatives (arbitration and administrative agency review) to the trust law principle of deferential judicial review and such alternatives were rejected. *See* S.Rep. No. 383, 93d Cong., 1st Sess. 110, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 5000; H.R. 2, 93d Cong., 2d Sess. § 691, 120 Cong. Rec. 5001 (1974). In addition, Congress had a later opportunity to reexamine such issue and declined to act. *See* H.R. 6226, 97th Cong., 2d Sess. (1982) (bill to amend Section 502 of ERISA to provide for *de novo* review of decisions denying benefits; referred to committee but never reported by committee for action).

In sum, the common law of trusts is a part and parcel of ERISA. It permeates throughout the content and structure of the statute and was what Congress intended to be the reference for purposes of development of federal common law under ERISA. There is no basis for deserting application of such principles as to a given part of or issue arising under ERISA. Indeed, to do so would likely upset or throw out of balance that delicately and carefully structured body of law.

III.

EXCEPT FOR THE THIRD CIRCUIT COURT OF APPEALS DECISION BELOW, ALL COURTS AGREE REGARDING APPLICABLE LAW AND CONGRESSIONAL INTENT

This Court has already ruled that Congress intended to incorporate trust law as the primary source of federal common law under ERISA and, further, that Congress intended that courts draw on that source of law in reviewing the conduct of plan fiduciaries:

> ... rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trust. 3 A. Scott, Law of Trusts § 186, p. 1496 (3d ed. 1967) (hereinafter "Scott").
>
> The manner in which trustee powers may be exercised, however, is further defined in the statute through the provision of strict standards of trustee conduct, also derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care.

Central States Pension Fund v. Central Transports, Inc., 472 U.S. 559,570 (1985).

Although the *Central States Pension Fund* case involved matters relating to preservation of plan assets, this Court's

discussion regarding the applicability of trust law was not limited to plan asset investment issues but encompassed operation and maintenance issues including, specifically, issues relating to determination of plan eligibility as well as compliance with reporting and disclosure requirements:

> One of the fundamental common law duties of a trustee is to preserve and maintain trust assets, *Bogert, supra,* § 582, at 346, and this encompasses determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries. *Id.* § 583, at 348 (footnotes omitted) . . . A trustee is similarly expected to "investigate the identity of the beneficiary when the trust documents do not clearly pick such party" and to "notify the beneficiaries under the trust of the gifts made to them. *Id.* at 348-349, n.40.
>
> The provisions of ERISA make clear that a benefit plan trustee is similarly subject to these responsibilities, not only as a result of general fiduciary standards of loyalty and care, borrowed as they are from the common law, but also as a result of more specific trustee duties itemized in the Act. For example, the Act's minimum reporting and disclosure standards require benefit plans to furnish all participants with various documents informing them of their rights and obligations under the plan, *see,* e.g., 29 U.S.C. §§ 1021, 1022, 1024(b), a task that would certainly include the duty of determining who is in fact a plan participant.

Central States Pension Fund, 472 U.S. at 572.

Several federal courts have specifically and correctly invoked trust law as the basis for ruling that the arbitrary and capricious standard is the appropriate standard of review of plan benefit claims decisions under ERISA. Some have chosen to do so directly:

> In *Reiherzer v. Shannon,* 581 F.2d 1266, 1272 (7th Cir. 1978) . . . we established that a challenge under section 502(a)(1)(B) of ERISA to a denial of pension benefits by a pension fund's trustees was to be overturned by a federal court only if it was "arbitrary and capricious in light of the language of the plan". Along with the Fifth and Eighth Circuits, we thus applied the traditional standard of review of the law of trusts

> used in diversity jurisdiction cases challenging such decisions. *Bayles v. Central States Pension Fund,* 602 F.2d 97, 99-100 & n.3 (5th Cir. 1979); *Bueneman v. Central States Pension Fund,* 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *see, also, Riley v. MEBA Pension Trust,* 570 F.2d 406, 408, 410 (2d Cir. 1977). The same standard of review applies to trustees' plan interpretations in an action seeking leave under section 502(a) generally.

Wardle v. Central States, Southeast & Southwest Areas Pension Fund, 627 F.2d 820, 823-824 (7th Cir. 1980).

> Brown argues that this Court should abandon the "arbitrary and capricious" standard in disability benefit cases because this analogy to trust law is inappropriate. Brown argues that a trustee protects and promotes the interests of the trust's beneficiary, but in disability benefit cases an adversarial relationship allegedly exists because the claimant seeks disability benefits and the retirement committee functions as "a claims adjuster of insurance funds".
>
> This description, however, is inaccurate . . .
>
> The fiduciary provisions of ERISA were designed to prevent a trustee "from being put into a position where he has dual loyalties and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.
>
> The language and legislative history of section 302(c)(5) [of the LMRA] and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him. *NLRB v. Amex Coal Co.,* 453 U.S. 322, 334, 101 S.Ct. 2789, 2796, 69 Lawyers Ed.2d 672 (1981) (quoting H.R. Conf. Rep. No. 93-1280, at 309 (1974) U.S. Code Cong. and Admin. News 1974, p. 4639). Because the administrator of a pension plan under ERISA is bound to act in the best interests of the plan participants, just as a trustee must exercise his fiduciary duty for the trust beneficiary, the adoption of a standard of review from trust law is appropriate.

Brown v. Retirement Comm., 797 F.2d 521, 526 (7th Cir. 1986).

Other federal courts have reached a similar determination that trust law mandates use of the arbitrary and capricious

standard by analogizing and comparing ERISA's civil enforcement and fiduciary provisions to those of section 302(c)(5) Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5):

> The "arbitrary and capricious" standard derives from section 302(c)(5) of the LMRA. That section imposes a duty of loyalty on section 302 trustees by permitting employer contributions to a welfare trust fund only if the contributions are used "for the sole and exclusive benefit of the employees . . .". Section 1104 of ERISA imposes a similar duty of loyalty, and not surprisingly the courts have applied the "arbitrary and capricious" standard under ERISA as well.

Struble v. New Jersey Brewery Employees Welfare Trust, 732 F.2d 325, 333 (3d Cir. 1984). Such analysis inevitably led (albeit indirectly) to the application of trust law because that was the law applied for purposes of developing the deferential standard of judicial review of Taft-Hartley plan fiduciaries. *See Kosty v. Lewis,* 319 F.2d 744 (D.C. Cir. 1963); *Ruth v. Lewis,* 166 F. Supp. 346 (D.D.C. 1958); (application of common law trust principles reasoning that a participant's status vis-a-vis the plan was that of beneficiary of a trust); *Compare Hobbs v. Lewis,* 159 F. Supp. 282 (D.D.C. 1958) (application of contractual rights analysis which resulted in imposition of an arbitrary and capricious standard of review). In sum, the arbitrary and capricious standard of review of fiduciary claim decisions under Taft-Hartley plans was a well-developed part of federal common law at the time of ERISA's enactment, and its extension to ERISA plan fiduciary decisions was logical and appropriate given the similarities and interplay between ERISA and the LMRA.[3]

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[3] Imposition of the arbitrary and capricious standard of review as developed with respect to trustees' decisions under Taft-Hartley plans to ERISA plans which are not themselves Taft-Hartley plans has not gone unquestioned, however. *See Varhola v. Doe,* 820 F.2d 809 (6th Cir. 1987) and *Van Boxel v. The Journal Company Employees' Pension Trust,* 836 F.2d 1048 (7th Cir. 1987).

IV.

THE COMMON LAW OF TRUSTS MANDATES JUDICIAL DEFERENCE TO FIDUCIARY DECISIONS

Congress left absolutely no doubt that the statutes comprising ERISA were to be fleshed out by a body of federal common law to be developed by the federal courts: "It is also intended that a body of federal law will be developed by the courts to deal with the issues involving rights and obligations under private welfare and private pension plans." Remarks of Senator Javits, 120 Cong. Rec. 29,942 (1974). In developing such body of federal common law, the courts, of course, would be confined by the statute comprising ERISA and Congressional intent, as evidenced both by the structure of such statute and the legislative history to ERISA. As discussed above, the federal courts have correctly referenced trust law as the basic body of law from which the federal common law under ERISA is to be developed. The question then becomes: Does the arbitrary and capricious standard of judicial review of plan fiduciaries' claims decisions represent an accurate reflection of common law trust principles?

The judicial standard of review applicable to common law trustees is one of great deference. If a trustee is given discretionary power, a court will not control or veto his exercise of it, instruct him how to use it, or substitute its own judgment for that of the trustee. *Restatement (Second) of Trusts* § 187 (1959); G. Bogert, *Trusts & Trustees* § 394 (2d ed. 1978); III A. Scott & W. Fratcher, *The Law of Trusts* § 187 (4th ed. 1988). A court will interfere, however, when a trustee has abused his discretion. Actions which are dishonest or in bad faith, such as acceptance of a bribe, are one example of conduct which is an abuse of discretion. *Restatement, supra,* comment f, at 403; III A. Scott, *supra,* § 187.4, at 44-45. Actions or decisions made with an improper motive, such as spite, prejudice or furtherance of some interest of the trustee or of a person other than a beneficiary, also constitute an abuse of discretion. *Restatement, supra,* comment g, at 404; III A. Scott, *supra,* § 187.5, at 46-47.

An abuse of discretion is also present where a trustee acts beyond the bounds of reasonable judgment. This rule applies

where a trustee has discretion regarding the management or investment of trust assets. A trustee must utilize proper care and skill, and must act prudently. *Restatement, supra* p. 13, comment i, at 406; III A. Scott, *supra* p. 13, § 187.2, at 33. The same principle of reasonableness is applicable to a trustee's discretionary power to make payments to beneficiaries. An abuse of discretion occurs when a trustee is paying less (or more) than a reasonable person would under the circumstances. *Id.*

Moreover, failure to use any judgment at all constitutes an abuse of discretion. For example, a decision made without knowledge or without inquiry is an abuse of discretion, as is an arbitrary decision made at the whim of the trustee. *Restatement, supra* p. 13, comment h, at 405. A trustee might also fail to exercise judgment because of an erroneous belief as to a matter of law. For example, a trustee might refuse to sell trust property due to an erroneous belief that he has no power of sale. III A. Scott, *supra* p. 13, § 187.3, at 43.

Relevant factors in evaluating a trustee's conduct are: (1) the extent of discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (4) the circumstances surrounding the exercise of the trustee's power; (5) the motives of the trustee in exercising or refraining from exercising his power; and (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries. *Restatement, supra* p. 13, comment d, at 403; III A. Scott, *supra* p. 13, § 187, at 15.

In reviewing a trustee's actions or decisions, a court must consider only the circumstances present at the time the action or decision took place, not the circumstances present at a subsequent time when his conduct is being questioned. *Restatement, supra* p. 13, § 174, comment b, at 379, § 227, comment o, at 535; G. Bogert, *supra* p. 13, § 541, at 159. "[I]t is by no means just for a judge to say, after bad consequences have arisen from an act done by a person exercising fiduciary powers, that he should have foreseen what subsequently happened, and therefore be held guilty of a breach of trust. If he did not foresee what no

person of ordinary foresight, standing in his place, could have foreseen, he has violated no duty, and incurred no liability." G. Bogert, *supra* p. 13, § 541, at 163. Thus, a trial *de novo* conducted by the court is inappropriate in the trust context.

To summarize, the well-settled judicial standard of review applicable under the common law of trusts is highly deferential. A court may not interfere with the decisions or actions of a trustee unless an abuse of discretion is demonstrated. Conduct which constitutes an abuse of discretion can be placed in four categories: (1) dishonesty/bad faith; (2) improper motives; (3) failure to exercise reasonable judgment; and (4) failure to use any judgment. A court is limited to consideration of circumstances present at the time the conduct occurred.

V.

THERE IS A LACK OF UNIFORMITY IN COURTS' APPLICATION OF THE STANDARD OF JUDICIAL REVIEW OF FIDUCIARIES' DECISIONS

With the exception of the aberrant decision in the case below, all federal courts, including the Third Circuit Court of Appeals, have applied a deferential standard of review to benefit claim decisions of plan fiduciaries as derived from the trust law standard of judicial review.[4] However, the courts have been considerably less than uniform in their application of trust law principles, and such differing applications bred the current confusion over the appropriate standard of judicial review of benefit claims decisions.

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[4] *Rueda v. Seafarers Int'l Union*, 576 F.2d 939 (1st Cir. 1978); *Riley v. MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977); *Shiffler v. Equitable Life Assur. Soc.*, 838 F.2d 78 (3rd Cir. 1988) (wherein the Third Circuit attempts to distinguish its own decision in the case below); *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197 (4th Cir. 1984); *Denton v. First Nat'l Bank*, 765 F.2d 1295 (5th Cir. 1985); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987); *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1987); *Bueneman v. Central States, Southeast & Southeast Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978); *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981); *Anderson v. Cieba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985); *Maggard v. O'Connell*, 671 F.2d 568 (D.C. Cir. 1982).

With the exception of the Second and Eleventh Circuits, the courts agree that the basic standard of judicial review is that "a plan fiduciary's decision must be upheld unless it is demonstrated to be arbitrary and capricious." *See* Authorities referenced in footnote 4 and discussed below. The inconsistency among the circuits arises from the various expansions or additions given to the standard by the courts. For example, the Fourth, Seventh, and Ninth Circuits impose the additional requirement that the decision be supported by substantial evidence. *LeFebre,* 747 F.2d at 208; *Wardle,* 627 F.2d at 824; *Music v. Western Conference of Teamsters Pension Fund,* 712 F.2d 413, 418 (9th Cir. 1983). The Sixth and Ninth Circuits require that the decision be made in good faith. *Adcock,* 822 F.2d at 626; *Music,* 712 F.2d at 418. The Seventh and Ninth Circuits will overturn a fiduciary's decision if it was based on an erroneous interpretation of law. *Wardle,* 627 F.2d at 824; *Music,* 712 F.2d at 418. The Eighth Circuit will uphold a fiduciary's decision unless it is "arbitrary or capricious or an abuse of discretion". *Bueneman,* 572 F.2d at 1209.

Finally, the Second and Eleventh Circuits abandon the "arbitrary and capricious" language and define the judicial standard of review as "determining whether the fiduciary's interpretation was made rationally and in good faith, not whether it was right". *Riley,* 570 F.2d at 410; *Anderson,* 759 F.2d at 1522. Although the language used to describe the standard varies from circuit to circuit, all courts give a high degree of deference to a fiduciary's decision.

To compound the confusion, courts have considered a wide range of factors when reviewing a fiduciary's decision. The most common factor is consideration of the plan language itself, determining whether the fiduciary's decision or interpretation is consistent with the plan language and whether the language has been interpreted or applied uniformly. *Bayles v. Central States, Southeast & Southwest Areas Pension Fund,* 602 F.2d 97, 100 (5th Cir. 1979); *Blakeman v. Mead Containers,* 779 F.2d 1146, 1151 (6th Cir. 1985); *Jung,* 755 F.2d at 713. Another common factor is whether the fiduciary had adequate evidence or factual development to support his decision. *See, i.e., Brown,* 797 F.2d at 532. Some courts consider whether the fiduciary's decision is

consistent with prior practice, *Jung,* 755 F.2d at 713, and others consider whether the fiduciary was acting in bad faith. *Cook v. Pension Plan for Salaried Employees,* 801 F.2d 865, 871 (6th Cir. 1986).

The Fourth Circuit will not consider ERISA procedural violations in evaluating a benefit decision, *Holland v. Burlington Indus., Inc.,* 772 F.2d 1140, 1149 (4th Cir. 1985), but the First, Seventh, and Ninth Circuits have held that egregious reporting violations may be relevant. *Barry v. Dymo Graphic Systems, Inc.,* 394 Mass. 830, 478 N.E.2d 707, 714 (1985); *Wolfe v. J.C. Penney Co., Inc.,* 710 F.2d 388, 393 (7th Cir. 1983); *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1984). Another area of disagreement among the circuits is the cost factor. For example, the Fifth Circuit has held that a fiduciary may properly limit benefits if an alternative decision would result in unanticipated costs to the plan so as to potentially limit resources available to the proper beneficiaries. *Bayles,* 602 F.2d at 100. Similarly, a court may consider the fiduciary's decision in light of his responsibility to all beneficiaries of the plan. *Rueda,* 576 F.2d at 942. Conversely, some courts consider avoidance of a substantial outlay to be indicative of a fiduciary's bad faith. *Jung,* 755 F.2d at 711.

In sum, the federal courts are in agreement that a fiduciary's decision must be given a high level of deference but have not consistently articulated the standard of review or the factors to consider when evaluating a fiduciary's decision. This Court now has the opportunity to formulate a uniform standard of judicial review.

VI.

THIS COURT SHOULD SETTLE THE STANDARD OF JUDICIAL REVIEW OF FIDUCIARIES' DECISIONS FOR PURPOSES OF UNIFORMITY

Courts have advanced many reasons why the arbitrary and capricious standard of review of plan fiduciaries' decisions is appropriate. These reasons support a conclusion that the arbitrary and capricious standard is appropriate regardless of

whether ERISA must be interpreted in accordance with trust law principles. First, the arbitrary and capricious standard leads neither to the abdication of the traditional role of fiduciaries nor to excessive judicial intervention in trust operations. *Rehmer v. Smith,* 555 F.2d 1365, 1371 (9th Cir. 1976). Second, the arbitrary and capricious standard fulfills Congressional intent that plan fiduciaries have and retain primary responsibility for claims processing. *Denton,* 765 F.2d at 1304. Third, the fiduciaries of a plan are deemed to be knowledgeable of the plan's purpose and operation and therefore are in the best position to make judgments regarding application of its provisions to a given set of circumstances such that their decisions should not be taken lightly by a court. *Holland,* 722 F.2d at 1148. Fourth, excessive judicial interference regarding plan fiduciaries' decisions would hamper the efficient and orderly day-to-day administration of plans, in clear conflict with Congressional intent. *Cook,* 801 F.2d at 871. Finally, excessive judicial interference in the ongoing operation and administration of plans would create a disincentive to employers' adoption, maintenance and expansion of such plans, both because of the additional costs resulting from additional scope of litigation involving plan fiduciaries' decisions, as well as the costs of payment of unanticipated benefits ordered by judicial fiat, thus disturbing the careful balance between regulation of these plans and employers' rights to design, implement and operate such plans as intended by Congress. H.R. Rep. No. 533, *supra* p. 8, at 4647; 120 Cong. Rec. 29,198 (1974) (Statement of Rep. Ullman).

There remains, however, the question of the correct standard of review of fiduciaries' decisions. Travelers respectfully submits that such standard should constitute a reasoned composite of the standards developed by the various federal courts since enactment of ERISA. It should recognize, as a starting point, that a fiduciary's benefit claim decision invariably involves three steps: (1) development of the facts and circumstances regarding the claimant's situation; (2) interpretation of the pertinent provisions of the plan; and (3) application of such interpretation to the claimant's situation. Viewed logically, the court's review of such fiduciary's action should follow the same track.

1. *Review of Facts and Circumstances.* A benefit plan claimant has a duty to place the facts and circumstances on which he bases his benefit claim before the fiduciary. The fiduciary then has the burden of reviewing such facts and circumstances and a limited duty to investigate further, if it deems such investigation appropriate. If the claim is denied, the claimant has the right to a full and fair review under ERISA's claim procedure and the right to place additional facts before the fiduciary. Because of these procedural protections, the courts should have only two alternatives in terms of review of facts and circumstances: to make a determination regarding the fiduciary's decision considering only the facts and circumstances which were before the fiduciary, or to remand the case back to the fiduciary for further development of the facts. Under either alternative, the fiduciary's determinations regarding factual conflicts should be given high deference. The second alternative should only be available if the record before the fiduciary was so deficient as a result of the fiduciary's failure to investigate (as opposed to the claimant's failure to cooperate, provide requested information, etc.) or so marred by procedural errors that a prudent fiduciary would have declined to make a decision based on such record.

2. *Plan Interpretation.* If the plan language is ambiguous or deficient or if the plan is simply silent, the court should give the greatest possible deference to the fiduciary's interpretation of the plan. The plan must be, as a practical matter of operation, fleshed out by its fiduciary's ongoing interpretation and administrative guidelines. When a plan document confers upon its fiduciaries powers of interpretation for purposes of ongoing administration, the sponsor of the plan has delegated to such fiduciaries the authority of such substantive interpretation as may be necessary to create orderly and efficient operation. Such scheme of operation was clearly contemplated by Congress and should not be set aside lightly by the courts. Left then, are the following situations in which a judicial reversal of a plan administrator's interpretation of a plan would be appropriate: the interpretation is clearly contradicted by the terms of the plan itself; the interpretation conflicts directly with past interpretations of the plan; the interpretation, although valid on its face, causes the plan to conflict with applicable law in operation; or the

interpretation, although valid on its face, is clearly inconsistent with the overall structure and purpose of the plan.

3. *Application of the Facts to the Plan Interpretation.* If the court has determined that the facts before the plan fiduciary were insufficient or has reversed the fiduciary's interpretation of the plan, this third step will not be reached. If, however, the court has determined that the facts before the fiduciary were sufficient to enable a decision by that fiduciary and that the fiduciary's interpretation of pertinent plan provisions must be upheld, then the court must determine whether application of the fiduciary's interpretation of the plan to the facts before the fiduciary would support the fiduciary's decision. Once again, great deference should be given to the fiduciary's factual determinations and plan interpretation and the court should interfere only if there is clear evidence of dishonesty or bad faith, or if the facts before the fiduciary as applied to the fiduciary's own interpretation of the plan would so clearly lead to a different result than that determined by the fiduciary that a prudent man could not have made such determination.

VII.

IF THE THIRD CIRCUIT DECISION IS UPHELD, IT SHOULD BE LIMITED

In its decision, the Third Circuit ruled as a matter of law that no judicial deference is to be given to the decision of a plan fiduciary if that plan fiduciary has a conflict of interest. Assuming that this Court is to uphold the Third Circuit, this Court's decision should be limited to circumstances where there is a clear conflict of interest on the part of a plan's fiduciary and there is no intervening neutralizing factor. For instance, a plan sponsor as the named fiduciary of a plan may retain the services of an unrelated neutral party to assist in the processing of claims under the plan or may consult with an independent fiduciary or retain independent counsel. In such situations, there would be a neutralizing influence vis-a-vis any potential conflict of interest that the plan sponsor might have. Accordingly, the rationale of the Third Circuit is and should be held to be inapplicable to such situations.

CONCLUSION

Travelers respectfully requests the Supreme Court to reverse the judgment below with regard to the issue considered in this *Amicus Curiae* brief for the reasons stated herein.

Respectfully submitted,

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